No. 15387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Jo Eisinger and Lorain B. Eisinger,

Appellants,

vs.

Commissioner of Internal Revenue,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

APPELLEE'S BRIEF DOES NOT SQUARELY OR ADEQUATELY MEET AND OVERCOME APPELLANTS' ARGUMENTS.

A. Briefly Summarized, Appellants Made the Following Arguments in Their Opening Brief:

1. The Tax Court Was Wrong in Holding That Part of the Payments Made Were "Payable for the Support of Minor Children" (p. 14).

Here Appellants fully discussed the case of *Weil v. Commissioner,* 240 F. 2d 584 (2d Cir. 1957) and pointed out that the *Weil* case clearly held that to be "payable for the support of minor children" within the meaning of the Section 22(k) of the 1939 Code, the use of the funds paid to the wife "must be restricted to that purpose, and the wife must have no independent beneficial interest therein." 240 F. 2d 588.[1]

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[1]It was also pointed out that nowhere in the record is there a finding or any facts which would support a finding that the Eisinger agreement, or the decree incorporating said agreement, required the wife to use any specific sum of money only for the support of minor children.

2. **All of the Decisions Cited and Relied Upon by the Tax Court Were Based on a Misconstruction of the Words "Payable for the Support of Minor Children" (p. 22).**

Here Appellants fully discussed the cases cited and relied upon by the Tax Court [Tr. Rec. 41-45] and pointed out that apparently, in all of said cases, the Courts without expressly considering the problem, interpreted the words "payable for the support of minor children" as meaning something entirely different from the meaning ascribed to the words by the *Weil* case. In addition, Appellants pointed out that in not one of the cases cited by the Tax Court did the instrument or the decree of divorce require the wife to use any specific sum of money only for the support of minor children. Therefore, under the reasoning of the *Weil* case, it was concluded that all of the cases cited by the Tax Court should have been decided differently.

3. **Properly Construed, the Property Settlement Agreement and the Divorce Decree Embodying It Provide Only for Alimony Payments to the Wife (p. 27).**

Here Appellants discussed the terms of the agreement between Appellant Jo Eisinger and his former wife Wilhelmina, and pointed out that the provisions of the agreement itself lead inevitably to the conclusion that the agreement and the decree embodying it do not provide for payments for the support of minor children within the meaning of Section 22(k) of the 1939 Code. This conclusion is reached without reference to the meaning of the words "payable for the support of minor children" as set forth in *Weil v. Commissioner.*

4. **The Case Law Favoring Appellants' Contention That the Tax Court Erred in Finding Part of the Payments Were for the Support of Minor Children (p. 32).**

Here Appellants discussed six cases all of which on principle are opposed to the decision rendered by the Tax Court.

B. In Answer to Appellants' Opening Brief, Appellee Has Presented the Following Arguments:

1. **"The Clear Purpose of Sections 23(u) and 22(k) Was to Relieve the Husband of Tax Only on That Portion of a Periodic Payment Which Was Not Designated or Identified in the Divorce Decree or Written Instrument Incident Thereto as Destined for Support of His Minor Children. . . . Therefore, Where, From the Divorce Decree or Written Instrument Incident Thereto, an Amount Can Be Ascertained as Allocable to the Support of Children, the Wife Is Not Required to Include in Her Gross Income Those Amounts Not Received by Her for Her Support" (p. 10).**

Nowhere in Appellee's brief is there anything to support this statement as to the "clear purpose of Section 23(u) and 22(k)." On the contrary, the clear purpose of Sections 23(u) and 22(k) was to relieve the husband of paying taxes upon sums of money paid by him to his former wife over which the former wife was given complete control. That this was the legislative purpose is borne out by the following:

(a) Section 22(k) says "payable for the support of minor children" and not "allocable" or "identifiable as

payable for" or "destined for" as suggested by the Commissioner in his brief.[2]

(b) *In Weil v. Commissioner,* 240 F. 2d 584 (2nd Cir., 1957), the Court stated:

> "We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein." (240 F. 2d 588.)

Thus, the fact that there may be indications in the agreement that some part of the payment was thought of by the parties as necessary to support the children is not sufficient to hold that that part is "payable for the support of minor children." We defy Appellee to point to any provision of the instant agreement restricting the wife to use any part of the payments made to her under the agreement *only* for the support of the minor children. On the other hand, the instrument read as a whole conclusively

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[2]It is most important here to note that Section 22(k) does not use the words "designated" or "identified as destined" for the support of minor children as the Commissioner indicates. The statute merely states "payable for the support of minor children."

It should be emphasized that throughout the Commissioner's brief, the attempt is made to create the impression that Section 22(k) reads that if any part of the money payable to the wife is *identifiable,* or *destined* or *allocable* for the support of minor children, it must be included in the husband's taxable income (e.g., pp. 10, 11, 12, 14, 20). This completely ignores and obscures the fact that Section 22(k) only uses the words "payable for the support of minor children." It nowhere uses the terms "identifiable" or "allocable" or "destined for." Therefore, Appellee's Brief should be read carefully with a view to recognizing, and thereupon deleting these words and substituting therefor the words "payable for the support of minor children." The meaning of the Statute is too important an issue to be obscured by misinterpretation caused by misstatement of its clear wording.

demonstrates that the parties intended that the wife should not be restricted in her use of any part of the payments. The husband bargained for the wife to support the children, just as did the husband in the agreement interpreted by *Weil v. Commissioner, supra.*

(c) The regulations promulgated by the Commissioner himself lend support to the interpretation given to Sections 22(k) and 23(u) by the Court in *Weil v. Commissioner.* Regulation 111, Section 29.22(k)-1.(d), 1939 Code, provides that "[s]ection 22(k), does not apply to that part of any periodic payment, which by the terms of the decree or the written instrument under Section 22(k), is *specifically designated as a sum payable for the support of minor children of the husband . . .*" (Italics added.) Note that *the Regulation requires specific designation* by the agreement of a sum payable for the support of minor children, and not as the Commissioner contends, just inferences drawn from provisions in the agreement which are obviously not intended to provide for child support. Nowhere in the instant agreement is there any *specific designation* of a sum which is payable for the support of minor children. Therefore, the regulations require a judgment contrary to that rendered by the Tax Court.

(d) The Court's attention is directed to the composition of Section 22(k) of the 1939 Internal Revenue Code (Appellants' Brief, pp. 8-9). The Statute provides that under certain conditions, periodic payments received by the wife shall be included in her gross income. It then continues "[t]his sub-section shall not apply to that part of any periodic payment . . . which is payable for the support of minor children of such husband." In effect, the latter sentence excepts certain portions of the payments from the operation of the Statute. It is a gener-

ally accepted rule of statutory construction that exceptions to a statute are narrowly construed. (*United States v. Scharton, Mass.,* 285 U. S. 518, 521; *Woods v. Oak Park Chateau Corp.,* 179 F. 2d 611, 614 (7th Cir., 1950); *National City v. Fritz,* 33 Cal. 2d 635, 636, 204 P. 2d 7, 9 (1949); 82 C. J. S., Statutes, Sec. 382.) If the words "payable for the support of minor children" are subject to more than one interpretation, narrow construction requires they be given the interpretation which would except from the requirement of inclusion in the wife's gross income the smallest amount of money possible.

In this case, several interpretations of the words "payable for the support of minor children" are possible. The words could be interpreted to mean any sums of money

(i) actually expended by the wife for support of the minor children, or

(ii) which some provision of the agreement may be taken as indicating that the parties may have thought of said sum as desirable or necessary for the support of the minor children, or

(iii) which the instrument or decree expressly designates as payable for the support of minor children, or

(iv) which the agreement or decree obligates the wife to use only for the support of minor children.

The first mentioned interpretation is of course the broadest construction of the words, and the fourth is the narrowest. It is submitted that under both the third and fourth interpretations and the facts of the instant case, the Tax Court should have concluded that no sum was "payable for the support of minor children." Therefore, the conclusion is inescapable that the Tax Court erred, and on this basis alone its decision should be reversed.

2. **Under the Principle of Construction That We Must Look to the Whole Instrument, "It Is Made Clear That . . . $62.50 Per Week Was Intended by the Parties as an Amount Payable for the Support of the Children" (p. 13).**

Here the Commissioner quotes some of the terms of the agreement and states that the "provisions discussed provide for two situations: (1) they cut off the wife's share of support ($62.50 a week) upon her remarriage, continuing the payments for the children's support and maintenance ($62.50 a week); and (2) they cut off the portion allocated to the support of the children ($62.50) under circumstances where it becomes no longer necessary to support them" (p. 13). It is submitted that Appellee's summary merely begs the question. Note his statement that the provisions "cut off the wife's share of support . . . upon her remarriage, continuing the payments for the children's support and maintenance . . . ." In stating that the provisions cut off the wife's "share of support" the Commissioner thereby assumes the very question that this case seeks to determine, *viz.*, whether only a "share" of each payment was for support of the wife and therefore, whether a "share" thereof was for the support of the minor children. Appellants' position is that the entire payments made were for the support of the wife. The provisions "cut off the portion allocated for the support of the children" states Appellee, thereby again assuming the very issue to be determined—whether there was in fact a portion allocable for the support of the children. It is strenuously urged that these arguments presented by Appellee are of no aid in determining the question here presented.

3. **The Provision That "If the Wife Shall Fail to Support Either or Both of Said Children, the Husband May Pay the Cost Thereof and Deduct the Same From Said Weekly Alimony" [Tr. Rec. p. 28] Merely Means That, if the Wife Fails to Support the Children, the Husband "Has the Right to Pay Her Only the Amount for Her Support, or $62.50 a Week" (pp. 15-16).**

Appellants confess that they have never seen a more tortured and ridiculous construction of any provision than the construction here adopted by the Commissioner. He would have this Court construe the phrase "the husband may pay the cost thereof" to mean something totally foreign to the plain meaning of the words used. Appellee then proceeds to state "[i]t is a settled proposition that a court will not read such forfeiture into a contract—especially so here where the parties, in the same provision, have fixed the 'cost' of child support at $31.25 a week for each child, and fixed the support of the wife at $62.50 a week." The Commissioner believes that the terms of the agreement which upon the wife's breach, give the husband the right to pay the actual cost of child support and deduct the same from "weekly alimony" is a forfeiture provision. However, this is not what courts refer to when they speak of not reading forfeitures into contracts.[3] Obviously, this is just a provision designed to protect the husband in the event the wife breaches her

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[3]In all cases cited by Appellee (p. 16), contracts existed which could be construed in more than one way. One possible construction would have resulted in the forfeiture of valuable property rights by one of the parties. Consequently, the Court adopted another, more reasonable construction. The provision in the Eisinger agreement admits of only one reasonable construction. Moreover, at any time the wife may halt what the Commissioner calls a "forfeiture" by resuming her support of the children, in accordance with her agreement.

agreement to support the children. Does Appellee contend that the husband cannot provide for deducting his damages in the event of such a breach? Indeed, the provision is superfluous since the husband could set off his damages even in the absence of express authority to do so. Such ridiculous reasoning by the Commissioner merely serves to emphasize the weakness and unsupportability of his position.

4. **"The Gist of the Taxpayer's Entire Argument Is That a Husband's Right to Deduct Periodic Alimony Payments Under Section 23(u) of the 1939 Code Is Dependent Upon His Right, Found in the Decree of Divorce or Written Agreement Incident Thereto, to Control Expenditures of the Sum Allocable to the Support of His Children" (p. 17).**[4]

This is a gross and unwarranted misstatement and misinterpretation of Appellants' Brief and of the clear and conclusive holding of the Second Circuit in *Weil v. Commissioner*. Nowhere does Appellants' brief indicate that in order for the husband to deduct payments made to the wife, he must have no control over expenditures of the sum paid, and conversely, that if he has control over the expenditures of the sum paid, he cannot deduct such sum from his taxable income. What Appellants' brief asserts and the *Weil* case affirms is that the wife's obligation to include sums paid to her in her taxable income under

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[4]If the "gist of the taxpayer's entire argument" is as stated by Appellee, query as to his statement at page 12 of his Brief "[p]aragraph 4 of the agreement begins . . . 'Husband agrees to pay to the Wife, by way of alimony, the sum of . . . ($125.00) per week. . . .' The taxpayer appears to contend . . . that it is this provision that is decisive in answering the question here involved."

Section 22(k) depends on whether she has complete control over the expenditure of the sums paid and therefore, a beneficial interest therein. Where she does, she must include the sums in her taxable income, and conversely, the husband may exclude said sums from his taxable income. On the other hand, where the sum paid to the wife, or any part thereof, is to be used *only* for support of minor children, such sum may not be included in the wife's, but must be included in the husband's taxable income. Therefore, where payments are made to the wife both for her own support and for the support and maintenance of the children, it is held that she must include the entire sum paid in her income, and the husband may exclude the entire sum from his income. (*E.g., Dora H. Moitoret v. Commisisoner, 7* T. C. 640 (1946); see Appellants' Brief, p. 32.)

Appellee forgets, or deliberately overlooks the fact that, where a sum is designated as payable only for the support of minor children by agreement or decree, the wife has no right to expend any part of said sum for her own support and maintenance, and her attempt to do so would be a violation of the duty and obligation imposed on her by the agreement or decree when she is given custody of the minor children. The only thing that she is permitted to do with such sums is to apply them to the children's support. If she applies any part of said sums for any purpose other than support of the children, she is violating a trust, and at least in the case of a court order, is subject to the power of the Court to enforce and protect its decrees.

5. **The Statement in Weil v. Commissioner ". . . to the Effect That a Husband Can Deduct All Periodic Payments Where There Is an 'Intention to Make Payments to the Wife and Have Her Support the Children'" Is "Dictum," Is "Taken Out of Context and so Taken Completely Ignores the Crucial Inquiry Under the Statute, Viz., Whether the Terms of the Decree or Agreement at Issue, When Read as a Whole, Fix a Sum Allocable to the Support of Minor Children" (p. 20).**[5]

Appellee completely misinterprets the true meaning of the decision in *Weil v. Commissioner*. That case was not, as the Commissioner would have it, a conclusion based solely upon the facts of the case that a sum of money was not "payable for the support of minor children." On the contrary, the *Weil* case clearly held that where the agreement or decree of divorce does not require the wife to use a specific sum of money *only* for the support of the minor children, the husband is entitled to deduct all of the money paid to the wife (providing, of course, the other requirements of Section 22(k) are met). Granted the Court in the *Weil* case examined the terms of the agreement and that they differ from the terms of the agreement here under consideration. However, the Court there clearly indicated that it examined the facts in order to determine whether the agreement required the wife to

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[5]The portion of the *Weil* case relied on by Appellants is not "dictum" as suggested by Appellee (p. 20). It is, instead, a clear and direct holding as to the meaning of the words "payable for the support of minor children." The Court's attention is invited to the following quotation from the *Weil* decision: "*We hold* that sums are 'payable for the support of minor children' when they are to be used for that purpose only." (Emphasis added; 240 F. 2d 588.) It seems to Appellants that the Second Circuit is in a better position than Appellee to judge whether its own words are dictum or holding.

use any specific amount of money only for the support of minor children. There is no basis for believing that it examined the *Weil* agreement with the intent of determining whether it contained any specific provisions indicating that the parties had in mind some certain amount of money as necessary for the support of the minor children. Since as in the *Weil* case, the agreement here under consideration does not require the wife to use any specific sum only for support of the minor children, this appeal should be decided in favor of Appellants.

There is no salvation for the Commissioner in any part of the *Weil* opinion. For example, he seeks solace in the fact that even the *Weil* case asserts the principle that the whole instrument must be examined to ascertain the intent of the parties (p. 17). It is agreed that this principle must be applied in the instant case. However, Appellants challenge the Commissioner to show any provision in the Eisinger agreement or decree which requires the wife to use any specific sum for the support of the minor children. The Commissioner apparently believes that his position should be sustained if he can point to one clause or provision in the agreement or decree which indicates that one or both of the parties might have had an idea or believed that it would be necessary for the wife to use a certain sum to support the minor children. This we wish to emphasize, is unimportant under the *Weil* case. *It is only where the wife must use some specific sum for support of the minor children that she does not have to include said sum in her taxable income.*

Appellants have made no attempt to lead the Court to believe that the agreement in the instant case does not differ from that in the *Weil* case. However, it is con-

tended that if in the *Weil* case, the Second Circuit had been faced with an agreement identical to the one here under consideration, it would nevertheless have held against the Commissioner on the basis of its conclusion as to the meaning of the words "payable for the support of minor children."

6. Appellants Have "Completely Ignored the Fact That Congress Has Recognized" That the Mandel and Budd Cases State the Correct Rule (p. 23).

Appellee states that "under the well-settled principle of statutory construction . . . reenactment of a statute without change or indicating disapproval of the uniform judicial construction which it has theretofore received is implied legislative approval of the prior construction . . ." (p. 23).

This argument is both misleading and unconvincing.[6] To begin with, Appellee does not make clear what rule stated by the *Budd* and *Mandel* cases has been recognized as correct by Congress. These two cases both hold that on the basis of the facts, part of the sums paid were "payable for the support of minor children." The only rule

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[6]Balanced against this "rule of statutory construction" relied on by the Commissioner, is the argument that since the Supreme Court of the United States has refused Certiorari in the case of *Weil v. Commissioner,* ..... U. S. ....., 77 S. Ct. 864, 1 L. Ed. 2d 909 (May 13, 1957), it thereby approved of the decision. (See, *e.g., Pender v. Commissioner of Internal Revenue,* 110 F. 2d 477, 479 (4th Cir., 1940), *cert. den.,* 310 U. S. 650; *Tasty Baking Co. v. United States,* 38 F. Supp. 844, 848 (Ct. Cls., 1941), *cert. den.,* 314 U. S. 654.) Therefore, it could be argued that the rule of *Weil v. Commissioner* has been approved by the Supreme Court of the United States. However, Appellants believe that such arguments as these should not obscure the main issue and prevent this Court from expressing its opinion as to the true meaning of Sections 22(k) and 23(u).

they announce is the rule that the agreement must be read in its entirety to determine the intent of the parties. However, Appellants fail to see where these cases announced any rule of construction with respect to the meaning of the words "payable for the support of minor children." Therefore, since the *Budd* and *Mandel* cases were decisions, based on their facts alone, that sums were payable for the support of minor children, Appellants fail to see where by reenactment of the Code provisions, Congress could have approved any rule which would serve to bolster Appellee's position.

In general, the cases cited by Appellee (p. 24) stand for the proposition that when Congress reenacts a statute after it has been uniformly construed by many cases over a relatively long period of time, the reenactment is *persuasive* evidence that Congress intended to approve the construction adopted by the cases, and this is especially true where the construction has been by the Supreme Court or the Courts of Appeal. In the instant case however, there has not been a uniform construction of the statute by cases decided over a long period of time. Moreover, of the few cases that have reached the Courts of Appeal, the *Weil* case is the only one which squarely meets the issue of the meaning of the statute in question, and the construction adopted therein is opposed to the construction contended for by the Appellee.

In addition, as stated by the Supreme Court in *Jones v. Liberty Glass Co.,* 332 U. S. 524, 533-534, "the contention is advanced that the legislative acquiescence in the interpretation must be assumed" because various lower federal courts have reached a uniform result. "But the doctrine of legislative acquiescence is at best only an

auxiliary tool for use in interpreting ambiguous statutory provisions." Moreover, particularly where there is not the "slightest affirmative indication that Congress" ever had the prior decisions before it, "[r]eenactment . . . is an unreliable indicium at best." *Commissioner v. Glenshaw Glass Company,* 348 U. S. 426, 431 (1955).

C. The Following Arguments Were Either Unanswered or Inadequately Answered by Appellee's Brief:

1. Nowhere Does Appellee Squarely Meet the Issue Raised by Appellants' Reliance on Weil v. Commissioner.

As pointed out *supra,* Appellee answers the holding of the *Weil* case by calling it "dictum" (p. 20) and by asserting that "when we read the Statute and its legislative history, we find nothing that suggests such requirement" (p. 17). However, nowhere does Appellee cite or refer to any case which expressly applies or sets forth a definition of "payable for the support of minor children" which is at variance with the definition adopted in *Weil v. Commissioner.*

2. Nowhere Does Appellee Adequately Discuss or Answer Appellants' Contention That "Properly Construed, the Property Settlement Agreement and the Divorce Decree Embodying It Provide Only for Alimony Payments to the Wife" (pp. 27-31).

In their opening brief, Appellants made the point that the property settlement agreement should be construed according to the intent of the parties thereto (p. 27). Appellants then discussed the relevant provisions of the agreement in question and enumerated nine points bearing on the intent of the parties as evidenced by the written agree-

ment (pp. 28-29). Of these, Appellants pointed out that seven conclusively evidence the parties' intent to provide payments for support of the wife only as distinct from support of the children; one evidences the intent of the parties to pay child support *but* only in the event of the wife's remarriage (which event did not occur prior to the payments made in 1949 and 1950, the years in question); and only one could be legitimately used by the Commissioner to support the Tax Court's decision—and this point is weak and inconclusive at best (see Appellants' Brief, pp. 30-31).

Although Appellee asserts that "[t]he test is the meaning of the parties as ascertained from the whole instrument" (p. 17), he ignores Appellants' argument that the provisions of the agreement should be consulted to determine the intent of the parties thereto. A cursory discussion of some of the above points appears in Appellee's brief (pp. 12-16, 22). Suffice it here to mention that Appellee chose to ignore the following points:

(a) At all times, payments to the wife are referred to as alimony.

(b) In consideration of the agreement of the husband to pay the wife $125.00 per week, the wife agrees to support the children.

(c) If the husband is called upon to pay any claim asserted against him by reason of a debt incurred by the wife, he may stop paying the alimony provided for until the weekly alimony aggregates the amount of the claim.

(d) "The parties have incorporated in this agreement their entire understanding. No oral statements nor prior written matter extrinsic to this agreement shall be in force or effect."

(e) Nowhere does the agreement provide for any specific sum to be applied by the wife to the support of the children.

Appellee does discuss the provision that "if the Wife fails to support the children, the Husband may pay the cost thereof and deduct same from the weekly alimony" (pp. 15-16). However, as pointed out *supra,* page 11, Appellee's explanation thereof is entirely out of touch with reality. The Commissioner emphasizes the provision that upon remarriage of the wife, the "alimony" payments to her cease "but in lieu thereof" the husband promises to pay for the support and maintenance of the children (pp. 13-14). However, he completely ignores the fact that in no other place does the agreement provide that payments made to the wife are for the support and maintenance of the children. In addition, he fails to point up that *this provision is inoperative unless the wife remarries.* Therefore, prior to the wife's remarriage, it should not be relied upon as evidence that some part of the payment was intended for child support. (See discussion, Appellants' Brief, pp. 29-30.) Of primary importance, however, is the fact that the Commissioner himself recognizes that provisions which are inoperative until the occurrence of some future event should not be used as evidence that the parties intended some part of the payments as child support before the event occurs. (See discussion of *Seltzer* and *Newcombe* cases, in Footnote 5, Appellee's Brief, pp. 18-19.)

Thus, as contended by Appellants (pp. 30-31), the only provision upon which Appellee can with some reason rely is that alimony payments are to be reduced upon certain future events, that is, the death or attainment of age 21

by the children. Appellants reassert that this provision alone is insufficient to support a finding that the agreement provides for payments for child support. Appellants agree with Appellee that *"the test is the meaning of the parties as ascertained from the whole instrument"* (p. 17). (Emphasis added.) But this just supports Appellants' position, because, *when the agreement is read as a whole, the conclusion is inescapable that the parties did not intend to provide for child support.*

3. Nowhere Does Appellee Adequately Counter the Case Law Cited as Favoring Appellants' Position.

In their opening brief, Appellants cited six cases in support of the proposition that the agreement in question did not provide for payments for the support of minor children (pp. 32-38). Appellee's entire discussion of Appellants' argument is contained in a footnote (designated number 5) appearing in Appellee's Brief (pp. 18-19). Here an attempt is made to distinguish the facts of the cases cited by Appellants from the facts of the case at bar.[7]

However, it is significant to note that nowhere does Appellee attempt to take issue with the propositions these cases stand for as set forth in Appellants' brief (pp. 37-38). Appellants submit that Appellee failed to contest the conclusions drawn from these cases by Appellants

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[7]In his discussion of the *Seltzer* case, Appellee states that the "taxpayer fails to point out, however, that the Tax Court there specifically pointed out (P. 208) that that provision was made applicable *only* if the parties were divorced in a jurisdiction other than New York; since they were divorced in New York, it never became effective." That Appellants failed to point out this fact is patently untrue. (See discussion of *Seltzer* case, Appellants' Brief pp. 32-33).

simply because there is no basis upon which he could reasonably contest them. Therefore, Appellants reaffirm the proposition that on the basis of these cases alone, the Tax Court should have held for Appellants.

II.

APPELLEE'S BRIEF CONTAINS A NUMBER OF ERRONEOUS, ILLOGICAL AND MISLEADING STATEMENTS.

Appellants have noted a number of erroneous, illogical and misleading statements contained in Appellee's Brief. Rather than greatly extend their Reply Brief in an attempt to dissect each statement falling into this category, Appellants have set forth each statement and a brief comment thereon in Appendix "A".

CONCLUSION.

The decision of the Tax Court should be reversed.

Respectfully submitted,

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APPENDIX "A."

Comparative Table Analyzing Erroneous, Illogical or Misleading Statements Contained in Appellee's Brief.

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
8	". . . The agreement reduces the periodic payments by a *fixed* sum . . . when the wife remarries, continuing the payments for the support of the children . . . thereafter. . . ."	Should read ". . . the agreement discontinues the periodic payments of alimony when and if the wife remarries, *and substitutes therefor* payments for support of the children." [Tr. Rec. p. 28.]
10	"The clear purpose of Sections 23(u) and 22(k) was to relieve the husband of tax only on that portion . . . not designated or identified in the . . . decree or . . . instrument . . . as destined for support of his minor children. . . . [W]here . . . an amount can be ascertained as allocable to the support of children, the wife is not required to include . . . those amounts. . . ."	Section 22(k) does not use the terms "designated" or "identified" or "destined for" or "allocable to." It merely says "payable for the support of minor children."

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
12	"The taxpayer appears to contend . . . that it is this provision that is decisive in answering the question here involved."	Nowhere in Appellants' Brief is there any justification for Appellee asserting that Appellants rely on one provision alone as decisive of the question presented.
12-13	"But in . . . paragraph (4) the parties give their own meaning to the term 'alimony.'"	Nowhere does Appellee set forth a convincing argument that the parties intended something different from the ordinary when they used the term "alimony."
14	"[T]he provisions . . . discussed . . . justify the Tax Court's conclusion that $62.50 of the $125 weekly payments was allocated for the support of the children. . . ."	The statute (Sec. 22(k)) does not use the term "allocated" for the support of minor children. It says "payable for."
14	"If the $125 weekly payments were, as the taxpayer contends . . . for the support of the wife only, and the support of the children was left to her indulgence, then . . ."	Nowhere does taxpayer contend or imply that support of the children was left to the wife's indulgence. The agreement and decree obligated the wife to support the children. What it did not do, however, is obligate her to use any specific sum of money for their support.

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
15	". . . [I]f the parties intended $125 weekly as wife support, then we have the anomalous situation of having the amount of the wife's support reduced by . . . $62.50 weekly eleven years hence (at the time the younger child reaches his majority) when it is reasonable to assume that the wife would have the most need for payments for her support."	At the time of the agreement the wife obligated herself to support two children. "Eleven years hence" she will only have herself to support. How then is it "reasonable to assume" that at that time "the wife would have the most need for payments for her support"?
15	". . . [P]aragraph 4 of the agreement . . . gives the taxpayer the right to pay directly for the support of the children, in lieu of giving the wife the sum fixed for child support. . . ."	Here again the Commissioner indulges in the practice of arguing from the premise that a sum is "fixed for child support" in the agreement. This, of course, is the very essence of the controversy.
16	"Indeed, the taxpayer concedes (Br. 30) that if we look to the instrument as a whole, 'a permissible inference may be drawn . . . that the parties had in mind that the support of each child would amount to $31.25 per week.' But he argues . . . that the majority of the provisions discussed	This is a flagrant misrepresentation of Appellants' words, which actually are, "Appellants agree that a permissible inference may be drawn from *this provision* . . ." (emphasis added; Appellants' Brief, p. 30). Moreover, Appellants never argue "that the majority of the provisions . . . should

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
	should be ignored because the wife had not remarried and the children had not died or reached twenty-one. . . ."	be ignored." On the contrary, Appellants emphasize that all provisions of the agreement should be considered—not just one or two (Appellants' Brief, pp. 27-31).
20	"But this statement . . . completely ignores the crucial inquiry under the statute, *viz.*, whether the terms of the decree or agreement at issue, when read as a whole, fix a sum allocable to the support of minor children."	Again, Appellants wish to point out that Section 22(k) reads "payable for" and not "allocable to the support of minor children."
22	"Thus we have an instrument which contemplates a *discontinuance* of a fixed amount of the periodic payments to the wife after she ceases . . . or where the husband is no longer obligated to support the children. Therefore, in accordance with the Second Circuit's view in the *Weil* case, the wife here did not have the independent beneficial interest that Mrs. Weil had."	Apparently, Appellee either misunderstands or misconstrues the requirement of "independent beneficial interest" as set forth in *Weil v. Commissioner*. Reference to that case reveals that the Court merely meant that where the wife was obligated to apply some part of the payment received to the support of the children, she could not use that part for her own benefit, and therefore she had "no independent beneficial interest therein." Since, as in the

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
		Weil case, the instant agreement or decree do not require the wife to apply any specific sum for child support, Mrs. Eisinger had the same "independent beneficial interest" in the payments made to her as did Mrs. Weil.
22	"From a reading of . . . the *Weil* case . . . it is clear that the rule announced . . . was that if, upon reading the agreement as a whole, there is a sum fixed as allocable to child support, then that sum is not deductible by the husband, but if a sum is not so fixed, then the husband can deduct all sums." (Footnote 9.)	No clearer misstatement of the rule of the *Weil* case could be made. It nowhere uses the term "allocable." It is beyond Appellants' understanding how the Commissioner has the temerity to urge this construction in view of the Court's statement, "we hold that sums are payable for the support of minor children when they are to be used for that purpose only." (240 F. 2d 588.)
22-23	"The taxpayer's arguments concede the fact that under the *Mandel* and *Budd* line of cases the Tax Court here drew a permissible inference, but ask this Court to declare those cases in error."	This is not true. Appellants nowhere conceded that under these cases the Tax Court drew a permissible inference that the payments made were for support of minor children.

APPENDIX "B."

Errata

Appellants' wish to call the Court's attention to the following errors appearing in Appellants' Opening Brief.

1. On page 4, the first line of the second full paragraph reads "On their 1949 and 1952 Income Tax Returns. . . ."

This should be corrected to read as follows:

"On their 1949 and 1950 Income Tax Returns. . . ."

2. On page 38, the last line of the Conclusion reads ". . . $6,729.00 during 1950, respectively."

This should be corrected to read as follows:

". . . $6,677.00 during 1950, respectively."